Nos. 00-1751, 00-1777, 00-1779

IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, *et al.*,

Petitioners,

-and-

HANNA PERKINS SCHOOL, *et al.*,

Petitioners,

-and-

SENEL HERMAN TAYLOR, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Establishment Clause of the First Amendment permits a State to pay private school tuition, including tuition at predominantly religious schools, where such payments so intertwine the State with the teachings of the private schools that the State feels compelled to restrict and regulate aspects of the schools' teachings in connection with the provision of the funds.

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INTEREST OF THE AMICUS CURIAE[1]

The National Committee for Public Education and Religious Liberty ("National PEARL") is a national coalition of organizations sharing the objective of preserving religious freedom and the separation of church and state in public education.[2]

National PEARL was the lead plaintiff in *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), upon which the court below relied and which Petitioners here seek to distinguish. National PEARL has also participated as *amicus curiae* in numerous other cases before this Court addressing Establishment Clause issues, including *Good News Club v. Milford Cent. Sch.*, 531 U.S. 923 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); and *Edwards v. Aguillard*, 482 U.S. 578 (1987). As a national organization dedicated to protecting religious freedoms for all citizens, and as a party to one of the principal precedents at stake here, National PEARL believes its participation as amicus curiae makes a meaningful contribution to the issues raised in this case.

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1. Pursuant to United States Supreme Court Rule 37.3(a), counsel of record has filed letters with the Clerk of Court consenting to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

2. National PEARL's members include the following organizations: A. Philip Randolph Institute, American Federation of Teachers, Americans for Religious Liberty, American Humanist Association, Central Conference of American Rabbis, Community Church of New York, Council of Supervisors and Administrators, Hadassah, Jewish Labor Committee, Jewish Reconstructionist Federation, Minnesota Civil Liberties Union, Monroe County PEARL, National Council of Jewish Women, National Education Association, National Center for Science Education, New York State United Teachers, Ohio PEARL, United Community Centers, United Federation of Teachers, United Synagogues of Conservative Judaism, Washington Area Secular Humanists, Woman's ORT, and Workmen's Circle.

STATEMENT OF THE CASE

In 1995, the Ohio legislature enacted the "Pilot Project Scholarship Program" (the "voucher program" or the "program"). Ohio Rev. Code Ann. ("ORC") §§ 3313.974-3313.979 (West 2001). The voucher program mandates that the Ohio Superintendent of Public Education provide scholarships and other assistance for certain Cleveland School District students in the kindergarten through eighth grades, to enable them to pay tuition necessary to attend nearby private schools or alternative public schools that meet standards set forth in the statute. *See id.* § 3313.975. The statute does not restrict the schools' use of the State's voucher payments in any way. Thus, participating religiously-affiliated private schools may use the state funds for any purpose, including the teaching and promotion of religious tenets. The program is targeted toward low-income families.

The statute established numerous rules governing the participation of schools in the program. Participating schools must be registered with the State Superintendent of Public Education. *See id.* § 3313.976(A). Among the requirements for registration, participating schools, whether public or private, must not "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." *Id.*

The overwhelming majority of schools that have registered to participate in the voucher program are sectarian. During the 1999-2000 school year, 82% (forty-six of fifty-six) of the schools participating in the program were church-affiliated. *See Simmons-Harris v. Zelman*, 234 F.3d 945, 949 (6th Cir. 2000). 96% of the students participating in Ohio's voucher program enrolled in sectarian schools. *Id.* No public schools have participated in the program. *Id.*

Participating private schools are subject to oversight by Ohio's Superintendent of Public Education in several

respects. First, prior to and as a condition of registration, the Superintendent must determine that private and public schools satisfy the standards of participation set forth in section 3313.976(A). *See* ORC § 3313.976(A). Once schools are registered, the Superintendent "shall revoke the registration of any school, if after a hearing, the superintendent determines that the school is in violation of any of the provisions" of section 3313.976(A). *Id.* § 3313.976(B).

Under Ohio's program, a voucher can only be used to pay the private school that registers and complies with the program's requirements, including the limitations on what the school advocates or teaches. Program funds for students in private schools are mailed directly to the participating schools, where the checks, which are payable to the parents, are presented to parents for endorsement over to the school. *Simmons-Harris*, 234 F.3d at 948 (State Pet. App. at 4a). If any neighboring public schools participated in the program (and, as noted, none to date do), grants for use at those schools would be paid directly to the relevant school district. *See* ORC § 3313.979.

SUMMARY OF ARGUMENT

Ohio's voucher program violates the Establishment Clause because, unlike in any of the cases upon which Petitioners primarily rely, the State's funds are provided to religious schools for use in their general or religious curriculum without restriction. Ohio's voucher program results in direct financial aid to religious schools. It is of no analytical significance that the voucher checks — which are mailed directly to private schools — must be endorsed by parents and thus pass momentarily through the hands of a third party. Parents have no discretion or control over the use of voucher funds; this is not a case in which a "student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education." *Mitchell v. Helms*, 530 U.S. 793, 842 (2000) (O'Connor, J., concurring). Under such circumstances, the statute does not merely subsidize the "private

choices of individuals," *Agostini v. Felton*, 521 U.S. 203, 226 (1997), but rather represents an unconstitutional governmental advancement of religion.

Direct government funding of religious schools without any limitations on the use of the funds, such as that provided by the Ohio voucher program, inevitably associates the government with the institution's religious message. The Ohio program thus violates the Establishment Clause by providing an "imprimatur of state approval" to the voucher schools, *Mueller v. Allen*, 463 U.S. 388, 399 (1983), resulting in a suggestion that indoctrination "has been done at the behest of the government." *Mitchell*, 530 U.S. at 809.

The most striking manifestation of this problem is the restriction placed on the doctrines taught by schools that wish to participate in the voucher program. The Ohio voucher statute contains a straightforward form of viewpoint discrimination. Schools may be registered to receive vouchers only if they do not "teach" hatred of other races and religions and only if they do not "advocate or foster" unlawful behavior. Ohio undoubtedly placed restrictions on voucher schools because it recognized that the teachings of schools receiving funds from the voucher program would carry the imprimatur of the State.

Indeed, the voucher program's content-based restrictions on speech survive constitutional scrutiny under the Free Speech Clause only because the schools' teachings are, in fact, in part the government's own message. Private parties have a right under the Free Speech Clause to teach hate and advocate unlawful behavior. This Court has, however, recognized that the government may refuse to fund a disfavored message "where the government's own message is being delivered" and "when the government speaks . . . to promote its own policies or to advance a particular idea." *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 541 (2001).

If the message taught in schools that receive vouchers is, in part, "the government's own message," the Ohio statute fails to "separate the government from endorsement of the religious message." *Mitchell*, 830 U.S. at 843 (concurring opinion). This creates an inference, impermissible under the Establishment Clause, that the State has also endorsed the religious message of the schools.

Moreover, an inquiry into whether a statutory scheme creates an excessive entanglement between religious organizations and the State "has consistently been an aspect of [the Court's] Establishment Clause analysis." *Agostini*, 521 U.S. at 232 (O'Connor, J.). Ohio's voucher program violates the Establishment Clause in this regard as well, because it results in excessive entanglement in sensitive areas of religious doctrine by compelling the State to regulate the teachings of religious schools.

The Ohio statute requires pervasive entanglement in a highly sensitive area. The State must determine whether the educational message — including an educational message dictated by the school's religious orientation — constitutes the teaching of hate of other groups or advocacy of violations of law. The regulation contemplated by the statute would inevitably collide with religious doctrine, given, for example, the long-standing history of religious civil disobedience. Moreover, Ohio's determination whether religious schools have violated the viewpoint discrimination provisions would inevitably prove to be politically divisive.

The Court cannot solve the constitutional infirmities with the Ohio voucher program by severing section 3313.976(A)(6) of the statute. Ohio's voucher program violates the Establishment Clause because the program's general funding of the participating schools creates the perception of a government imprimatur for the message taught in religious schools. Removing only this provision, which is merely the most striking symptom of the underlying problem, would not cure

the underlying defect in the statute. Moreover, severance would be improper under Ohio law because the provisions in question are "so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out." *State v. Hochhausler*, 668 N.E.2d 457, 466-67 (Ohio 1996) (internal citations and quotation omitted). Thus, the Court must declare the statute unconstitutional in its entirety.

ARGUMENT

The Sixth Circuit properly held that Ohio's voucher program violates the Establishment Clause of the United States Constitution. The grounds set forth in the Sixth Circuit's opinion are sufficient in themselves for this Court to conclude, as did the lower court, that Ohio's program is unconstitutional. Mindful, however, of the Court's instruction that "[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court," Sup. Ct. Rule 37.1, this brief focuses primarily on issues that the parties have not previously addressed.

I. OHIO'S VOUCHER PROGRAM CROSSES THE LINE BETWEEN PERMISSIBLE AND CONSTITUTIONALLY FORBIDDEN AID TO RELIGIOUS SCHOOLS THAT HAS EXISTED SINCE THE *EVERSON* DECISION.

This Court has long recognized Jefferson's edict that the First Amendment was "intended to erect 'a wall of separation between church and state.' " *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States* 98 U.S. 145, 164 (1878)). As noted in *Lee v. Weisman*, 505 U.S. 577, 601 (1992) (Blackmun, J., concurring, joined by Stevens and O'Connor, JJ.), even the dissenters in *Everson* agreed that "'[t]he Amendment's purpose . . . was to create a complete and permanent separation of the spheres of religious activity and

civil authority by comprehensively forbidding every form of public aid or support for religion.'" 505 U.S. at 601 (alteration in original) (quoting *Everson*, 330 U.S. at 31-32 (Rutledge, J., dissenting, joined by Frankfurter, Jackson, and Burton, JJ.)).

The Founders intended the First Amendment's clauses on religion to shield religion from governmental interference as well as to maintain a nonsectarian government. James Madison warned that "experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." Memorial and Remonstrance Against Religious Assessments, Par. 7 (1785) (hereinafter "Remonstrance"), *reprinted in* Appendix to *Everson*, 330 U.S. at 63-72 (Rutledge, J., dissenting). Madison declared that "in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." Remonstrance, Par. 1, *reprinted in* Appendix to *Everson*, 330 U.S. at 63-72.

The Court in *Lee v. Weisman* echoed this belief: "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." 505 U.S. at 589. "[T]he lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." *Id.* at 591-92.

> The lessons of the First Amendment are as urgent in the modern world as in the 18th century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.

Id. at 592.

This is not a time for the principle of separation of church and state to be diluted. This nation's unique contribution to religious freedom has been its fundamental principle of separation of church and state. This principle has been redefined from time to time, but there is no question of its lasting value in the promotion of peace and prosperity domestically, and the promise it may hold for the rest of the world faced with threats from nations that, to quote James Madison in his Remonstrance, use religion as an "engine of civil policy." Remonstrance, Par. 5, *reprinted in* Appendix to *Everson*, 330 U.S. at 63-72.

There is no question that Ohio's voucher program results in direct financial aid to religious schools. Indeed, the religious schools are the actual, direct, and primary recipient of government funds under the program. Although funds are nominally payable in the first instance to the parents of voucher program students, the checks are not even mailed to the parents of participating students. Rather, checks are mailed to the private schools, where the parents must endorse the check over to the school to pay for tuition. The simple expedient of momentarily funneling the funds through the hands of third parties — who have no discretion or control over the use of the funds — cannot transform the nature of the constitutional analysis.

This is not a case in which a "student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education." *Mitchell v. Helms*, 530 U.S. 793, 842 (2000) (O'Connor, J., concurring). Religious schools may use Ohio's voucher funds to support their general curricula no matter how much the curricula may inculcate religious doctrines or other teachings. Yet, Petitioners acknowledge that:

> In programs of direct aid, if a religious school employs that aid to inculcate religious doctrine or teaching, it might be argued that the government has communicated a subtle message of endorsement.

State Petitioners Br. at 21 (citing *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring)). Because the substance of the Ohio

program is one of direct aid, the voucher program is unconstitutional for the very reason identified by Petitioners.

This aspect of the Ohio voucher program, government funds being provided to religious schools to use without restriction in their general curriculum, distinguishes this case from every case upon which Petitioners primarily rely: *Everson*, 330 U.S. 1; *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968); *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); and *Mitchell*, 530 U.S. 793. In each one of those cases, the government benefit either had a minimal relationship to religious indoctrination (free bus fare in *Everson*, books in *Allen*, tax deductions for educational expenses in *Mueller*, and interpreters in *Witters* and *Zobrest*), or the benefit program expressly barred the use of funds for religious purposes (the remedial instruction in *Agostini* and the teaching aids in *Mitchell*). In no case has this Court upheld direct aid to schools of the type found in the Ohio program that can be used to pay for religious indoctrination. As Justice O'Connor noted in *Mitchell*, although the Court's cases "have permitted some government funding of secular functions performed by sectarian organizations," its "decisions provide no precedent for the use of public funds to finance religious activities." 530 U.S. at 840 (internal quotation and citation omitted).

Nothing in this Court's precedents or in the history of the Establishment Clause justifies crossing the line that has existed from *Everson* to the present day. The Ohio program — which provides direct funds with "no strings attached" — is, and should remain, on the wrong side of that line.

II. OHIO'S VOUCHER PROGRAM RESULTS IN UNLAWFUL GOVERNMENT INDOCTRINATION OF RELIGION.

Notwithstanding the evolution of this Court's Establishment Clause jurisprudence, a bedrock principle remains clear: The government may not appear to engage in religious indoctrination. *Mitchell*, 530 U.S. at 808 (plurality opinion); *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) ("For a law to have forbidden 'effects' under *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971)], it must be fair to say that the *government itself* has advanced religion through its own activities and influence.") (emphasis added). The voucher program violates the Establishment Clause because the indoctrination that occurs in Ohio schools funded with program money is attributable to the government.

A. The Establishment Clause Is Violated If Religious Indoctrination Can Be Attributed To The State.

"As [the Court has] repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion." *Agostini*, 521 U.S. at 223-25 (upholding statute because public employees teaching secular remedial classes in private schools would not engage in religious indoctrination). Even where the government does not itself engage in indoctrination, government aid to religious institutions violates the Establishment Clause if the aid program conveys an "imprimatur of state approval," *Mueller*, 463 U.S. at 399, upon the recipients of state funds, resulting in a suggestion that indoctrination "has been done at the behest of the government." *Mitchell*, 530 U.S. at 809.

Government funding of religious schools, such as that provided by the Ohio voucher program, without any limitations on the use or channeling of the funds for particular purposes, inevitably associates the government with the institution's message. In this case, the most striking manifestation of this

problem is the restrictions placed on the doctrines that the schools may teach. Ohio placed restrictions on those doctrines undoubtedly because it recognized that the teachings of schools receiving funds from the voucher program would carry the imprimatur of the State. Indeed, as explained below, the statute's restrictions on speech survive constitutional scrutiny under the Free Speech Clause only because the schools' teachings, in fact, carry the imprimatur of being the government's own message.

Under those circumstances, the statute does not merely subsidize the "private choices of individuals," *Agostini*, 521 U.S. at 226, but rather represents an unconstitutional governmental advancement of religion.

B. The Viewpoint-Related Criteria For Schools To Participate In The Voucher Program Survive Scrutiny Under The Free Speech Clause Because The Schools Are Perceived To Be In Part Communicating The Government's Own Message.

1. The Ohio statute's viewpoint discrimination would normally violate the First Amendment's Free Speech Clause.

The Ohio statute does not allow state funding to go to just any school selected by a voucher program participant. Rather, vouchers can be used only at schools that have registered with the State Superintendent of Public Instruction. The Superintendent may register a school only if, *inter alia*, it does not "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." ORC § 3313.976(A)(6). This viewpoint discrimination would normally violate the First Amendment's Free Speech Clause.

Advocacy of "hatred" and "unlawful behavior" by private actors is subject to First Amendment protections against

government interference, and viewpoint discrimination in such circumstances would be unconstitutional.[3] "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Statutes will be held unconstitutional on their face where they are targeted at ideas the government seeks to suppress. *Cohen v. California*, 403 U.S. 15, 18 (1971). Thus, content-based discrimination against speech is "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and subject to "the most exacting scrutiny," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994).

It has been clear since *Brandenburg v. Ohio*, 395 U.S. 444 (1969), that the First Amendment's free speech guarantees embrace the right to "teach or advocate" violations of law. *Id.* at 445. Restrictions on speech by private parties that advocate violations of law are constitutional only where the "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," *id.* at 447, but the Ohio law at issue here contains no such limitation on the advocacy that it seeks to restrict. In *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), this Court reaffirmed this principle, when it upheld the Oregon statute that had the effect of preventing Native Americans from smoking peyote as

3. The state may, of course, bar schools from engaging in discriminatory *conduct*, as it has done in ORC § 3313.976(A)(4), which prohibits a participating school from "discriminat[ing] on the basis of race, religion, or ethnic background." *See Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding denial of tax exemption to religious schools that had discriminatory admissions policies). But there is a world of difference between restricting discriminatory conduct and mere teaching or speech. As this Court held in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995), "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579.

required by their religion only because there was "no contention that Oregon's drug law represents an attempt to regulate . . . the communication of religious beliefs, or the raising of one's children in those beliefs." *Id.* at 882.

It is similarly clear that the First Amendment protects speech by private parties that advocates or teaches hatred based on race, ethnicity, national origin, or religion. In *R.A.V. v. City of St. Paul*, this Court held unconstitutional a city ordinance that criminalized speech that the speaker "kn[ew] or ha[d] reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. at 380. The Court found impermissible viewpoint discrimination because the content limitation "display[ed] the city council's special hostility towards the particular biases thus singled out," *id.* at 396, and because "the First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391.[4] Similarly, in *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940), this Court overturned on free speech grounds the conviction of a Jehovah's Witness for criticizing other religious groups as "instruments of Satan" — arguably a manifestation of hatred on the basis of religion.

The Ohio voucher program thus contains a straightforward form of viewpoint discrimination. The Superintendent may register schools that "teach" tolerance of other races and religions and "advocate or foster" compliance with law. She may not register schools that "advocate or foster" the opposite viewpoint, not endorsed by the state in the statute.

Although the Ohio statute does not criminalize or otherwise directly regulate speech, it does condition a benefit — the right of schools to accept state-funded vouchers —upon the viewpoint

4. The Court so held even while acknowledging that the ordinance's scope was arguably limited, as the Ohio statute is not, to "fighting words." 505 U.S. at 381.

advocated by the school that seeks to register. Such a financial disincentive for "disfavored" speech, if applied to private actors, violates the First Amendment's free speech guarantee every bit as much as does an outright prohibition. "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). *Accord Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (upholding tax deductions for contributions to veterans' groups engaged in lobbying while denying deductions to other groups that lobbied, but observing that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas.") (internal citation and quotation omitted); *Los Angeles Police Dept. v. United Reporting Publ'g Corp.*, 528 U.S. 32, 43 (1999) ("[I]f the award of the subsidy *is not based on an illegitimate criterion such as viewpoint*, California is free to support some speech without supporting other speech.") (emphasis added).

2. The Ohio Statute does not raise free speech concerns because vouchers are funding in part the government's own message.

Even though viewpoint discrimination — whether through regulation or in the form of discriminatory subsidies — violates the First Amendment's free speech guarantees when applied to private actors, the government may place restrictions on speech when it is subsidizing its own message. The Court addressed this issue directly in *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 541 (2001):

> We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, *see Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229, 235, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000),

> or instances, like *Rust* [*v. Sullivan*, 500 U.S. 173 (1991)], in which the government "used private speakers to transmit specific information pertaining to its own program." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). As we said in *Rosenberger*, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Ibid.*

Thus, under this Court's precedents, restrictions on speech are permitted only "where the government's own message is being delivered" and "when the government speaks . . . to promote its own policies or to advance a particular idea." *Legal Servs. Corp.*, 531 U.S. at 541 (internal citation and quotation omitted). Restrictions on government-funded doctors were acceptable in *Rust* because they were engaged in "governmental speech." *Id.* at 541. But restrictions on student organizations in *Rosenberger* and lawyers in *Legal Services Corp.* were unconstitutional because the programs were "designed to facilitate private speech, not to promote a governmental message." *Id.* at 542.

C. Because The Schools That Accept Vouchers Are Properly Seen To Be Communicating In Part A Governmental Message, The Ohio Voucher Program Violates The Establishment Clause Because Of The Inference Of Government Endorsement Of The Schools' Religious Message.

The State's regulation of the message advocated by schools that receive voucher funds is grounded on the foundation that the schools' message will be seen, accurately, as in part the State's own message. If the message is one of religious indoctrination or the advancement of religion, as it is at many

of the schools that receive voucher funds, the program thus violates the Establishment Clause. *See Mitchell*, 530 U.S. at 808 (plurality opinion).

A "reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief." *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in judgment). The schools' message is not "endorsed only by the individuals attending the religious school," but also by the State. *Mitchell*, 530 U.S. at 843 (concurring opinion). The Ohio statute does not "separate the government from endorsement of the religious message." *Id.* Moreover, Ohio has expressly involved itself in the message of schools deemed eligible to accept vouchers through the qualification provisions in the voucher statute. This creates an inference, impermissible under the Establishment Clause, that the State has also endorsed the religious message of the schools.

This case is much like *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), in which the Court addressed a claim that student-led, student-initiated invocations prior to school football games did not violate the Establishment Clause because they were "private student speech." *Id.* at 302. Distinguishing *Rosenberger*, which held that "an individual's contribution to a government-created forum was not government speech," *id.* at 302, the Court found that the invocation was government speech in part because the "invocation . . . is subject to particular regulations that confine the content and topic of the student's message." *Id.* at 303. The student's speech violated the Establishment Clause because it would be "perceive[d] . . . as a state endorsement of prayer in public schools." *Id.* at 308 (internal citation and quotation omitted). Similarly in the case of the Ohio program, the schools that receive vouchers are not merely a government-subsidized forum. Because the State controls elements of the message in the forum, the speech is properly attributable to the government, creating a violation of the Establishment Clause.

As Justice O'Connor recognized in her concurrence in *Mitchell v. Helms*, the question of whether the government is engaged in "'general[] or evenhanded[]'" distribution of funds "'is relevant in judging whether a benefit scheme so characterized should be seen as aiding a sectarian school's religious mission.'" *Mitchell*, 530 U.S. at 840 (quoting *id.* at 883-84 (Souter, J., dissenting)). There is no such "general or evenhanded" distribution of funds under the Ohio statute; funds do not go to schools with a message inconsistent with that endorsed by the State. The factual situation here is thus distinguishable from those in *Mitchell* and *Agostini*, in which aid was available to students at *any* private school. *See Mitchell*, 530 U.S. at 802[5]; *Agostini*, 521 U.S. at 208-210. The Minnesota statute at issue in *Mueller* similarly allowed tax deductions for school expenses regardless of the school's viewpoint. *See* 463 U.S. at 398-99.

If the private schools participating in the Ohio voucher program were merely promoting their own private viewpoint, there would be no reason — and could be no Constitutional basis — for the State of Ohio to deny vouchers to schools that taught hate or promoted violations of law. If the State were merely funding the "genuinely independent and private choices of individuals," *Mitchell*, 530 U.S. at 810 (plurality opinion) (internal citation and quotation omitted), it would be as indifferent to the schools' message as it is to the message promoted by a church to which a government employee donated her paycheck. *Cf. Witters*, 474 U.S. at 486-87. The inference of a governmental endorsement of the message of religious schools funded by the Ohio voucher program, and the State's involvement with and selection among the schools' messages

5. The Chapter 2 aid in *Mitchell* was available to all public schools, but only to nonprofit private schools. *See* 530 U.S. at 802; 20 U.S.C. § 7372(a). This limitation based upon the corporate form of the schools, unlike the viewpoint regulations at issue here, does not suggest a government imprimatur on the viewpoints taught by the recipients of state aid.

that necessarily follows from that inference, renders the statute unconstitutional.

III. THE OHIO VOUCHER PROGRAM ALSO RESULTS IN EXCESSIVE ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGIOUS ORGANIZATIONS.

The Ohio voucher program, by mandating governmental regulation of the message "advocated" or "fostered" by participating religious schools, creates an excessive entanglement between religious organizations and the State and therefore violates the Establishment Clause for this reason as well.

A. Avoidance Of Entanglement Is A Fundamental Aspect Of Establishment Clause Jurisprudence.

The Court has consistently declared that, in order to survive scrutiny under the Establishment Clause, a statute must do more than offer facial neutrality toward religion. "We must also be sure that the end result — the effect — is not an excessive government entanglement with religion." *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970). *See also Mitchell*, 530 U.S. at 839 (O'Connor, J., concurring) ("[W]e have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid.") (emphasis in original).

For thirty years, the "general nature" of this Court's Establishment Clause analysis has been governed by the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See, e.g., Mueller*, 463 U.S. at 394 (applying the three-pronged test). Despite incremental adjustments to the Court's application of the test, *Lemon* remains the touchstone for determining whether the State has run afoul of the Establishment Clause.

To survive an Establishment Clause challenge, first, a "statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-613 (citations omitted). Under the third prong of *Lemon* and its progeny, the Court examines whether State involvement or monitoring of religious programs is excessive or pervasive. "[S]tate surveillance" that is "comprehensive, discriminating, and continuing" violates the Establishment Clause. *Mueller*, 463 U.S. at 403 (quoting *Lemon*, 403 U.S. at 619). "The intrusion of government into religious schools through grants, supervision, or surveillance may result in establishment of religion in the constitutional sense when what the State does enthrones a particular sect for overt or subtle propagation of its faith." *Lemon*, 403 U.S. at 634 (Douglas, J., concurring). In *Lemon* and *Walz*, the Court characterized this concept as "entanglement." *See id.*; *Walz*, 397 U.S. at 674.

In *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), this Court applied the *Lemon* test and held unconstitutional a New York program whose essential components matched those of the Ohio voucher program. Like the Ohio program, the New York program awarded tuition reimbursements to low-income parents of children attending private schools. *Nyquist*, 413 U.S. at 785-86 ("Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same."). As in Ohio, the vast majority of schools eligible for participation were sectarian. *Id.* at 768. Since parents in the *Nyquist* program paid the schools, there was no restriction on the private schools' use of the tuition reimbursement funds. The Court found that there was "no endeavor to guarantee the separation between secular and religious educational functions and to ensure the State financial aid supports only the former." *Id.* at 783 (quoting *Lemon*, 403 U.S. at 613) (internal quotation omitted).

The Court had no occasion to assess the *Nyquist* program under the excessive entanglement prong, having found the program to be unconstitutional under the second *Lemon* prong. *Id.* at 794. The *Nyquist* decision did, however, communicate the Court's fears — relevant to this matter — that "apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion." *Id.*[6]

This Court's recent jurisprudence continues to recognize the dangers of excessive entanglement between government and religion. This Court applied the *Lemon* test in *Agostini* and assessed whether "New York City's Title I program resulted in an excessive entanglement between church and state." 521 U.S. at 232. The Court found in *Agostini* that "[w]hether a government aid program results in such an entanglement has *consistently been an aspect of our Establishment Clause analysis*." *Id.* (emphasis added). The political entanglement analysis has been applied both as "a factor separate and apart from effect" in the *Lemon* test and as "an aspect of the inquiry into a statute's effect." *Id.* at 232-33.

Under the doctrine of *stare decisis*, this Court should hesitate before abandoning the excessive entanglement test for scrutinizing state actions impinging on religious activity. As the Court has held repeatedly, "While *stare decisis* is not an inexorable command, particularly when we are interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure

6. In *Mueller*, the Court stated that its analysis of political divisiveness would be "confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools." 463 U.S. at 403 n.11. As discussed *supra* pp. 8-9, although the voucher funds are nominally payable in the first instance to the parents of voucher program students, this is a mere formalism to disguise what is in substance a direct payment to the religious schools.

from precedent to be supported by some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (internal quotations and citations omitted). There is no "special justification" to abandon the examination of excessive entanglement required by *Lemon* and its progeny, including *Nyquist* and *Agostini*.

B. Ohio's Voucher Program Causes Excessive Entanglement Between The State and Religious Schools Because Administrative Enforcement of Ohio's Viewpoint Discrimination Provisions Inevitably Requires The State To Evaluate And Interfere With Religious Doctrines.

"The allocation of public funds is invariably accompanied by limitations and restrictions on the use of such funds, in order to insure that the legislative intent is satisfied." *Pub. Funds for Pub. Sch. v. Marburger*, 358 F. Supp. 29, 38 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974). Here, as in *Marburger*, "[h]aving imposed such limitations and restrictions, the State must enforce them." *Id.* Therein lies the impermissible entanglement. As the Court noted in *Rosenberger*, for a state body "to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith . . . would tend inevitably to entangle the State with religion in a manner forbidden by our cases." 515 U.S. at 845 (internal citation and quotation omitted). The speech-prohibitive provisions of Ohio's voucher law require just such an inquiry.

Under the Ohio statutory scheme, "[t]he state superintendent shall revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation of any of the provisions of division (A) of this section," ORC § 3313.976(B), including the provisions relating to viewpoint advocacy. Thus, the statute contemplates both (a) a threshold determination by a state official, and (b) continual

monitoring by state officials of the appropriateness of the content of the teachings advanced by the schools that accept vouchers.

In *Lemon* itself, the Court held that less intrusive involvement by the State in a religious school's affairs than that present here gave rise to impermissible entanglement. In *Lemon*, the statute providing for supplementation of the salaries of teachers of secular subjects required only a review of the subject matter that was taught. *See* 403 U.S. at 607-08 ("[T]he records of the school in question must be examined in order to assess how much of the expenditure is attributable to secular education and how much to religious activity."). The Court nevertheless found excessive entanglement because "the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state." *Id.* at 621-22.

Ohio's statute restricting the content of teaching by schools participating in the voucher program requires entanglement in an even more sensitive area. Ohio must do more than determine whether teaching is religious. It must determine whether the educational message — including an educational message dictated by the school's religious orientation — constitutes the teaching of hatred or advocacy of violations of law, requiring disqualification of the school from participation in the voucher program.

The concern here is not purely hypothetical. Religions have a long history of "advocat[ing] or fostering unlawful behavior." *See, e.g.*, *United States v. Seeger*, 380 U.S. 163, 186-87 (1965) (noting Quakers' refusal to participate in armed conflict); *Pierson v. Ray*, 386 U.S. 547, 552-53 (1967) (noting arrest of Episcopal clergymen for violating "whites only" ordinance). This Court's cases are replete with examples of religious faiths espousing principles contrary to law.

See, e.g., *Employment Div.*, 494 U.S. 872 (Native American religion requiring use of controlled substance); *United States v. Lee*, 455 U.S. 252 (1982) (Amish employer's objection to collection of Social Security taxes on religious grounds); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (religious principles requiring children to distribute literature in violation of child labor laws); *Reynolds*, 98 U.S. 145 (Mormon practice of polygamy). Moreover, it is not difficult to imagine, especially at this moment, claims that faiths are teaching "hatred" of nonbelievers. *See, e.g.*, Marc Fisher, *Muslim Students Weigh Questions of Allegiance*, WASH. POST, Oct. 16, 2001, at B1 (principal of Muslim school in Potomac, Maryland advocated that Israel, "with its cursed population . . . is founded on a racist, warped, cancerous ideology which says Jews are better than all other people.") (alteration in original).

Although this Court has recently downplayed the importance of "political divisiveness" in evaluating entanglement,[7] it is difficult to imagine a more divisive activity than a state's determination whether religious doctrine teaches hatred or advocates lawlessness. Ohio's Superintendent of Public Instruction is required under the statutory scheme to decide whether a Jewish school's discussion of the concept of the "chosen people" or a Christian

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7. *Mitchell*, 530 U.S. at 825-26 (plurality opinion). *But see id.* at 872 n.2 (Souter, J., dissenting, joined by Stevens and Ginsburg, JJ.)

> The Court may well have moved away from considering the political divisiveness threatened by particular instances of aid as a practical criterion for applying the Establishment Clause case by case, but we have never questioned its importance as a motivating concern behind the Establishment Clause, nor could we change history to find that sectarian conflict did not influence the Framers who wrote it.

school's discussion of the role of Jews in the trial of Jesus "teach hatred of any person or group on the basis of . . . religion." She must similarly determine whether religious doctrine regarding, for example, engaging in civil disobedience in the course of opposing abortion or refusing compulsory military service "advocate[s] or foster[s] unlawful behavior."[8] As in *Marburger*, the content provisions in the Ohio statute make it "necessary to continually review the content of a teacher's instruction in order to see that it adheres to the restrictions imposed by the statute." *Marburger*, 358 F. Supp. at 40.

Moreover, the statute's contemplation of a "hearing," at which alleged infractions would be evaluated prior to revocation of registration, underscores the impropriety of the level of government control and oversight present here. Presumably there would be testimony taken and determinations of credibility regarding the nature and permissibility under the statute of disfavored religious beliefs being conveyed to students. The Court equated that type of process with impermissible entanglement in *NLRB v. Catholic Bishop of Chicago*, 440 U.S 490 (1979), in which it held that the NLRB could not exercise jurisdiction over lay faculty members at church-operated schools. The Court said, with respect to charges of unfair labor practices in which the school responded that the challenged action was mandated by religious creed:

> The resolution of [unfair labor practice] charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by

8. The problematic nature of such monitoring is compounded by the vagueness inherent in the statutory language, which gives administrators charged with enforcing the program much opportunity for arbitrary, subjective, and discretionary application.

> the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

Id. at 502.

As this Court has recognized in the past, this is the very sort of entanglement of church and state that the Framers intended the Establishment Clause to guard against. *Cf. Meek v. Pittenger*, 421 U.S. 349, 372 (1975) ("To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed.").[9] Yet, Ohio mandates such entanglement as part of its voucher program.

C. The Intrusion Into Doctrinal Matters Here Distinguishes This Program From The Limited Neutral State Regulatory Oversight That This Court Has Permitted.

To be sure, the Court has from time to time held that subjecting a religious body to a generally applicable regulatory regime does not create an impermissible level of entanglement. For example, "[t]he Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations." *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 305 (1985) (citing *Lemon*, 403 U.S. at 614). With regard to the specific regulatory requirements at issue in *Alamo*, the Court reasoned, "the recordkeeping requirements of the Fair Labor

9. *Meek* was overruled by *Mitchell* "[t]o the extent that *Meek* . . . conflict[s] with [*Mitchell*'s] holding." *Mitchell*, 530 U.S. at 835 (plurality opinion). But *Mitchell* recognized that an inquiry into "whether the aid creates an excessive entanglement between government and religion" remains one of the "general principles used to determine whether government aid violates the Establishment Clause." *Id.* at 844-45 (O'Connor, J., concurring).

Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs." *Id.* at 305-06. Key to the Court's conclusion in this regard was that the matters covered by the Fair Labor Standards Act were "routine and factual inquiries" and that "[t]hese requirements apply only to commercial activities undertaken with a 'business purpose,' and would therefore have no impact on petitioners' own evangelical activities." *Id.* at 305. *See also Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 253 (1990) (holding, in the context of a challenge to a statute requiring public schools that established an open forum to give access to religious speech, that a public school teacher's "custodial oversight of the student-initiated religious group, merely to ensure order and good behavior, does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities"); *Hernandez v. Comm'r*, 490 U.S. 680, 696-97 (1989) ("[R]outine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies does not of itself violate the nonentanglement command.") (citations omitted).

In *Lemon* itself, Justice Douglas's concurring opinion recognized that "we have never faced, until recently, the problem of policing sectarian schools. Any surveillance to date has been minor and has related only to the consistently unchallenged matters of accreditation of the sectarian school in the State's school system." *Lemon*, 403 U.S. at 631 (Douglas, J., concurring).

In Ohio's program, the level of entanglement is qualitatively different than in *Alamo*, *Mergens*, and *Hernandez*, and moves far beyond the minor, accreditation-related surveillance noted by Justice Douglas in *Lemon*. The State of Ohio engages in direct supervision, not over undeniably secular matters such as record-keeping or fire inspections, but over what tenets and

doctrines the schools are teaching their students. As far as religious schools are concerned, these inquiries necessarily bring the state directly into issues of curriculum content interwoven with religious concepts and ideals. *See Lemon*, 403 U.S. at 635 (Douglas, J., concurring) ("'It is a commonplace observation that in the parochial school religion permeates the whole curriculum, and is not confined to a single half-hour period of the day.'" (quoting Joseph H. Fichter, *Parochial School: A Sociological Study* 86 (1958))).

Thus, the voucher program, which holds out the promise of government funding, entails an unprecedented scope of governmental involvement in the operation, including the teachings and curricula, of religiously affiliated schools. As Justice Brennan noted in an analogous context, "[p]olicing the content of courses, the specific textbooks used, and indeed the words of teachers is far different from the legitimate policing carried on under state compulsory attendance laws or laws regulating minimum levels of educational achievement." *Lemon*, 403 U.S. at 651 (separate opinion of Brennan, J.). For this reason, the voucher program crosses the line from permissible neutral regulatory oversight into unconstitutional pervasive entanglement in matters of religious belief and doctrine.

IV. THE FLAWS IN THE OHIO VOUCHER PROGRAM CANNOT BE CURED BY SEVERING THE PROVISION BARRING REGISTRATION OF SCHOOLS THAT TEACH HATE OR ADVOCATE UNLAWFUL BEHAVIOR.

The Court cannot solve the constitutional infirmities with the Ohio voucher program by severing section 3313.976(A)(6).

Severability analysis is only appropriate where one discrete provision or aspect of a statute is unconstitutional and the statute would otherwise pass muster. That is not the case here. The problems highlighted by the viewpoint discrimination contained in section 3313.976(A)(6) merely reflect the

underlying flaw in the voucher program. As discussed above, the State felt compelled to restrict the message taught in voucher program schools — and that restriction survives scrutiny under the Free Speech Clause — only because the State recognized that it was providing its stamp of endorsement on the message of voucher program schools, including sectarian schools. Removing the viewpoint restriction from the statute does not eliminate that fundamental flaw in the voucher program itself. Ohio's voucher program violates the Establishment Clause because the program creates the perception of a government imprimatur for the message taught in religious schools. Removing only one symptomatic provision would not cure the underlying defect.

Moreover, even if a severability analysis were in order, it would not be appropriate to sever the provisions at issue and leave the statute otherwise standing. Severance would be improper under Ohio law because the provisions in question are "so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out." *State v. Hochhausler*, 668 N.E.2d 457, 466-67 (Ohio 1996) (internal citations and quotation omitted). This is true even where, as here, there are statutory severability provisions. ORC § 1.50 (general severability clause); 1999 Ohio Law Files 37, Section 54 (severability clause contained in the voucher statute). *See State ex rel. Squire v. City of Cleveland*, 82 N.E.2d 709, 725 (Ohio 1948) ("Although consideration must be given to the fact that an act contains a separability clause, such a clause is not conclusive. . . .").

The essential inquiry is whether the Ohio legislature would have created the voucher program if it knew that the result would be to allow the possible funding of schools that teach hate or advocate unlawful activity. *See State ex rel. Herbert v. Ferguson*, 52 N.E.2d 980, 984 (Ohio 1944) (holding that severance occurs only if the remaining "statute is still capable of fulfilling the

apparent legislative intent"). The text and structure of the statute make clear that Ohio did not intend to fund a voucher program if that meant the possibility of funding schools that meet all of the objective eligibility requirements, but teach hate or advocate unlawful conduct.[10] It would be an extraordinary exercise of judicial power effectively to institute such a program without an express indication from the legislature that it foresaw and intended such a possible result.

Four Justices of this Court recently observed, in the context of a statute (like this one) providing funding but restricting activities by those receiving the funds, that "when an 'excepting proviso is found unconstitutional the substantive provisions which it qualifies cannot stand,' for 'to hold otherwise would be to extend the scope of the law . . . so as to embrace [situations] which the legislature passing the statute had, by its very terms, expressly excluded.'" *Legal Servs. Corp.*, 531 U.S. at 561 (Scalia, J., dissenting, joined by Rehnquist, O'Connor, and Thomas, JJ.) (quoting *Frost v. Corporation Comm'n*, 278 U.S. 515, 525 (1929)).[11] To do so would "'rewrite [the] statute and

10. *Dicta* in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), addressed the severability of a different section of a former version of the voucher program before ultimately holding the entire statute unconstitutional under the "one subject" rule. That discussion is, in any case, inapposite. It concerned a provision of the statute that enabled sectarian schools to give admissions preference to students who belonged to the religious group affiliated with the school. *See id.* at 210. It is one thing to say that the legislature would have intended to have the program go forward without that provision, since the result is simply that students have more equitable access to the program. It is quite another to rewrite the statute to obligate the state to fund schools meeting the objective eligibility requirements for the program even if those schools teach hate or unlawful behavior.

11. Severability of state law provisions is a question of state law. *See, e.g., Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (*per curiam*). Nevertheless, there is no meaningful difference between Ohio's severability standard and that applied by this Court in cases, such as *Legal Services Corp.*, involving federal statutes.

give it an effect altogether different'" from that intended by the legislature. *Id.* at 562 (alteration in original) (quoting *Railroad Ret. Bd. v. Alton R. Co.*, 295 U.S. 330, 362 (1935)). Section 3313.976(A)(6) is a similar "excepting proviso"; the Ohio legislature's funding of the voucher program and its prohibition on funds going to schools advocating hate or law violations are "conditions, considerations and compensations for each other that cannot be severed" without the substantial likelihood of violating the intent of the Ohio legislature. *Legal Servs. Corp.*, 531 U.S. at 560 (internal quotation and citation omitted). Thus, the Court must invalidate the statute in its entirety.

CONCLUSION

The decision of the Sixth Circuit should be affirmed.

Respectfully submitted,

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